STATE OF MICHIGAN

COURT OF APPEALS

DARREN BUCK,

Plaintiff-Appellant,

V

PAUL W. DAVIS SYSTEMS, INC., n/k/a PAUL DAVIS RESTORATION, INC.,

Defendant-Appellee.

UNPUBLISHED
November 25, 2003

No. 240966
Ingham Circuit Court
LC No. 00-092326-CK

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Plaintiff, Darren Buck, appeals the trial court's grant of summary disposition to defendant, Paul W. Davis Systems, Inc., n/k/a Paul Davis Restoration, Inc. (PDRI). We affirm.

I. Facts and Procedural History

In February 1992, D.E.L.T. Corporation, d/b/a Paul Davis Systems of Lansing, Michigan (D.E.L.T.), entered a franchise agreement with PDRI to operate a PDRI insurance restoration franchise in Lansing. D.E.L.T. entered another franchise agreement with PDRI in December 1996, to operate a PDRI franchise in Grand Rapids. In April 1993, Buck signed an associate employee agreement with D.E.L.T. Corporation and he later worked as the operations manager for D.E.L.T. in the Grand Rapids franchise territory.

In 1998, D.E.L.T. offered Buck shares in D.E.L.T. Corporation. Pursuant to the franchise agreement with PDRI, D.E.L.T. had to obtain PDRI's consent before transferring to Buck partial ownership of the business. On July 1, 1998, PDRI, D.E.L.T. and Buck entered an agreement and consent to transfer. Among other provisions, the agreement states that Buck is bound by the two-year non-competition provision and dispute resolution clause in the PDRI franchise agreement. The dispute resolution provision states that claims arising out of the contract shall be settled by arbitration procedures set forth in the PDRI operations manual.

Buck resigned from D.E.L.T. in April 2000 and began to work for a competing business, Sunrise Company, Inc., an insurance restoration firm in Lansing. On May 3, 2000, PDRI's attorney, Michael Stokes, sent a cease and desist letter to Buck to notify him that he was in violation of the non-competition provision of his contract. Stokes requested that Buck respond within ten days with a statement that he will no longer engage in a competing business. Two

days later, D.E.L.T. filed an action against Buck for breach of contract and injunctive relief in Ingham Circuit Court. Thereafter, PDRI president, Scott Baker, called Buck and asked if he would be interested in a division general manager position with PDRI. The parties disagree about whether Buck immediately declined the position, but no further communication occurred between PDRI and Buck until July 2000, when PDRI filed an arbitration claim against Buck for violation of the non-competition provision.

In August 2000, Buck's attorney wrote to the arbitration committee and sought to dismiss the proceedings. Buck alleged that the arbitration procedures were unfair and the arbitration panel was biased in favor of PDRI. The arbitration panel declined to dismiss the claims. Buck filed his complaint in this case on August 29, 2000, and requested a declaratory judgment that the arbitration agreement violates procedural fairness and is, therefore, invalid and unenforceable. Buck also filed an *ex-parte* motion for a preliminary injunction to prevent the continuation of the arbitration. The trial court granted Buck's motion on August 31, 2000. Thereafter, the trial court dismissed Buck's claims pursuant to PDRI's motion for summary disposition, but the court allowed Buck to file an amended complaint. Plaintiff filed his amended complaint on May 2, 2001, and alleged that, through its participation in the D.E.L.T. lawsuit, PDRI waived its contractual right to arbitrate. In response, PDRI filed a motion for summary disposition under MCR 2.116(C)(10), and the trial court granted the motion in a written order filed on April 8, 2002.

II. Analysis

A. Standard of Review and Applicable Law

As this Court explained in *Mino v Clio School Dist*, 255 Mich App 60, 67-68; 661 NW2d 586 (2003):

> A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal. *Liberty Mut Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155 (2001). A motion for summary disposition tests whether there is factual support for a claim. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed " 'in the light most favorable to the party opposing the motion.' " *Universal Underwriters, supra* at 720, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Universal Underwriters, supra* at 720.

In reviewing a trial court's decision regarding the waiver of a right to arbitrate, this Court explained in *Madison Dist Public Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001):

> Whether one has waived his right to arbitration depends on the particular facts and circumstances of each case. *Hendrickson v Moghissi*, 158 Mich App 290, 299-300; 404 NW2d 728 (1987). We review de novo the question of law whether the relevant circumstances establish a waiver of the right to arbitration, *North West Michigan Const, Inc v Stroud*, 185 Mich App 649, 650-652; 462 NW2d 804 (1990), and we review for clear error the trial court's factual determinations regarding the applicable circumstances. MCR 2.613(C).

We now quote at length from this Court's decision in *Madison, supra*, because it thoroughly sets forth the applicable standards for our decision here:

> Waiver of a contractual right to arbitrate is disfavored. *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998). The "party arguing there has been a waiver of this right bears a heavy burden of proof" and "must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Id*., quoting *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995).[1] This Court has noted the following guidance with respect to what actions tend to indicate a waiver of the right to arbitration.
>
> In most jurisdictions, the right to arbitration may be waived by certain conduct, with each case decided on the basis of its particular facts and circumstances:
>
> "Various forms of participation by a [party] in an action have been considered by the courts in determining whether there has been a waiver of the

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[1] We observe that the difficult burden to establish waiver of a right to arbitrate is consistent with our well-established principles that encourage arbitration. See *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 127-128; 596 NW2d 208 (1999). ("[o]ur Legislature has expressed a strong public policy favoring private voluntary arbitration, and our courts have historically enforced agreements to arbitrate disputes.") As the *Rembert* panel further observed at 128-129:

> Judicial approbation of arbitration has grown and now applies to many fields. For example, in the important area of medical malpractice, our Court, in *Cox v D'Addario*, 225 Mich App 113, 129-130; 570 NW2d 284 (1997), upheld an arbitration agreement as valid under Michigan's medical malpractice act because "the public policy of this state favors the enforcement of valid arbitration agreements." Further, in *Moss v Dep't of Mental Health*, 159 Mich App 257, 264; 406 NW2d 203 (1987), involving statutory and contract rights of mental health provider employees, our Court held that arbitration was not an "unconstitutional intrusion upon the powers of the judiciary," but rather is a "well-established mechanism for dispute resolution which is highly favored by the courts."

> [party]'s right to compel arbitration or to rely on arbitration as a defense to the action. It has been generally held or recognized that by such conduct as defending the action or proceeding with the trial, a [party] waives the right to arbitration of the dispute involved. A waiver of the right to arbitrration [sic] . . . has also been found from particular acts of participation by a [party], each act being considered independently as constituting a waiver. Thus, a [party] has been held to have waived the right to arbitration of the dispute involved by filing an answer without properly demanding or asserting the right to arbitration, by filing an answer containing a counterclaim . . . without demanding arbitration or by filing a counterclaim which was considered inconsistent with a previous demand for arbitration, by filing a third-party complaint or cross-claim, or by taking various other steps, including filing a notice of readiness for trial, filing a motion for summary judgment, or utilizing judicial discovery procedures." [*Madison, supra* at 588-589, quoting *Hendrickson, supra* at 299-300, quoting anno: *Defendant's participation in action as waiver of right to arbitration of dispute involved therein*, 98 ALR3d 767, § 2, pp. 771-772.]

B. Discussion

Here, the trial court correctly ruled that Buck failed to raise an issue of material fact to establish his claim that PDRI waived its right to arbitrate. The litigation initiated by D.E.L.T. was by the franchisee alone and did not include claims by or on behalf of PDRI. The documentary evidence clearly establishes that PDRI neither responded to nor participated in the D.E.L.T. litigation to any degree that would suggest a waiver of arbitration. Rather, PDRI initiated its arbitration remedies against Buck during the D.E.L.T. litigation and before the resolution of D.E.L.T.'s claims against Buck. While D.E.L.T. attorneys may have carbon copied PDRI on certain aspects of the D.E.L.T. litigation, this does not rise to the level of an *activity by PDRI* that is inconsistent with its right to arbitrate claims against Buck.

Buck asserts that the trial court judge in *D.E.L.T. v Buck* considered adding PDRI as a party to the litigation. However, the statements made at the disputed *D.E.L.T. v Buck* hearing relate to whether D.E.L.T. or Paul Davis Systems of Lansing, Michigan entered the agreements with Buck, not PDRI, a Florida corporation. Further, were we to read the transcript as a reference to PDRI, we do not interpret an assertion by D.E.L.T.'s attorney regarding an affiliation with PDRI as an action by PDRI to waive arbitration. We also do not deem PDRI's job offer to Buck as inconsistent with a right to arbitrate. While the offer would have necessarily negated Buck's continuing violation of the non-competition agreements with both D.E.L.T. and PDRI, the evidence shows that this was PDRI's attempt to avoid its own arbitration, not a tactic to control or dispose of the D.E.L.T. litigation.

The trial court did not err when it ruled that Buck failed to establish a triable issue of fact regarding PDRI's alleged waiver of arbitration. Buck simply did not meet his heavy burden of showing that PDRI acted in a manner inconsistent with its right to arbitrate. PDRI did not join in or control the D.E.L.T. litigation and, instead, filed a timely and independent arbitration action, consistent with its contractual rights.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad